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No. 84-1360

Supreme Court, U.S.

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JOSEPH F. SPANIOLO, JR.
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In The
Supreme Court of the United States
October Term, 1984

— o —
THE CITY OF RENTON, et al,

Appellants,

vs.

PLAYTIME THEATRES, INC.,
a Washington Corporation, et al,

Appellees.

— o —
On Appeal From The United States Court Of Appeals
For The Ninth Circuit

— o —
SECOND SUPPLEMENTAL BRIEF OF APPELLEES

— o —
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REASON FOR SECOND SUPPLEMENTAL BRIEF

This second Supplemental Brief is submitted in order to draw the Court's attention to a case which was not known to Appellees in time to be included in their first Supplemental Brief.

ADDITIONAL ARGUMENT

The operative facts in *International Food v. City of Fort Lauderdale*, 614 F.Supp. 1517 (D.C.Fla. 1985) are virtually identical to those of the case at bar. The analysis of the Court is instructive and persuasive.

The Court felt uncomfortable making a subjective "clairvoyant" evaluation about matters that should be judged only by objective criteria. In particular, the Court was concerned with the problem of local governments establishing *before the fact* that adult entertainment produces a deleterious effect on the community. The Court recognized that "[a]ny local government can hire a group of experts to say that 'adult' entertainment produces undesirable consequences." *Id.* at 1521. Rather than focusing on concerns that may be content related, the Court felt a better approach would be to deal with "those interests within the community whose existence and operation interfere with the peace and tranquillity of the rest." *Id.* at 1522.

Appellees share this concern. Legislative fact finding is undeniably based largely on inadmissible hearsay and opinion evidence which is not subject to cross examination. It is not a search for truth; rather, it is a search for political justification for legislative action.

This Court should not, as Renton urges, abandon its traditional role of closely scrutinizing legislative action that intrudes on protected speech. Rather, this Court should send a clear message that any content-based restriction on speech must be based upon a governmental concern that can be empirically established by competent evidence and that such concern be related solely to the secondary effects of the operational characteristics of a business and not to the perceived secondary effects of the content of the speech.

Another issue discussed by the Court was the issue of access to the market place of constitutionally protected speech. With respect to Sellers, the Court concluded, like all Courts before it, that the dispositive question is whether commercially viable locations are in fact available, not whether legally permissible locations exist.

... the majority [available locations] are located in areas that are so patently unsuitable for businesses like plaintiff's that the regulations effectively zone the subject "adult" entertainment out of the city. *Id.* at 1521.

In addition, the Court found that the lack of suitable locations also hindered the public's First Amendment right to have reasonable access to adult entertainment.

Implicit in this issue is the subsidiary issue of who has the burden of establishing the availability of suitable locations. Logically, under any test, this burden should fall to the city.¹ In the instant case, Renton has never

1. As a practical matter, in formulating a restrictive ordinance, a city must at least identify the legally permissible locations to insure against a zone out. At that point, the permissible loca-

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argued that a substantial number of the legally permissible locations are viable or suitable locations for the operation of a commercial business such as a theatre. Additionally, Renton has never disputed the evidence that, as a practical matter, all of the legally permissible locations are, in fact, unavailable (JA 216-228). It has, instead, urged this Court to accept the proposition that the mere existence of legally permissible locations is constitutionally sufficient (Appellants' Brief at 29-35). The record in this case establishes that there are only two suitable locations (JA 231). Neither of these locations is available, and, in fact, one of the two locations is probably too small in size to accommodate a theatre (JA 231). Even if we were to assume that these two suitable locations were available, paraphrasing Judge Gonzales, two or so potential sites in the City of Renton does not a "myriad" make. *Id.* at 1522, citing *Young v. American Mini Theaters*, 96 S.Ct. at 2453 n.35.

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tions should be surveyed to insure both their suitability and availability. If the City is able to substantiate that it in fact identified a substantial number of suitable and available locations during the legislative process, the burden should shift to the challenger to rebut such a prima facie showing. This issue becomes increasingly significant as the size of the municipality increases. In large metropolitan areas, it may be financially burdensome or next to impossible to prove, as an initial proposition, the negative that no locations exist.

CONCLUSION

The interest of the American people in the preservation of their right to live and express themselves free from government intrusion is more important than the interests which the Appellants assert. The decisions of a municipal body, which serves the will of the majority, regarding precious First Amendment rights must remain subject to the closest judicial scrutiny.

Respectfully submitted,

JACK R. BURNS